Date: 20111104

File: 566-02-4515

Citation: 2011 PSLRB 126

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

FARZAD BIGDELI-AZARI

Grievor

and

DEPUTY HEAD
(Department of Veterans Affairs)

Respondent

Indexed as
Bigdeli-Azari v. Deputy Head (Department of Veterans Affairs)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Yashar Tahmassebi, law clerk

For the Respondent: Benoît de Champlain, counsel

Heard at Montreal, Quebec,
October 25, 2011.
(PSLRB Translation)

Individual grievance referred to adjudication

[1] Farzad Bigdeli-Azari, the grievor, worked for the Department of Veterans Affairs ("the deputy head" or "the employer") as a general attendant at Ste. Anne's Hospital in the West Island of Montreal. In July 2010, the employer notified him that it would remove his name from the on-call employee list. On August 16, 2010, Mr. Bigdeli-Azari filed a grievance challenging the employer's decision to remove his name from the list, which terminated his employment. In its reply to the grievance, the employer indicated that it could not respond to the grievance because Mr. Bigdeli-Azari was not an employee under the *Public Service Labour Relations Act* ("the *Act*").

[2] On December 6, 2010, after Mr. Bigdeli-Azari referred his grievance to adjudication, the employer reiterated its position that he was not an employee within the meaning of the *Act* and that, therefore, he could not file a grievance. The employer asked the adjudicator to dismiss the grievance without a hearing. On December 24, 2010, Mr. Bigdeli-Azari asked that the employer's objection be overruled because, in his opinion, he was an employee under the *Act*, and therefore, he had the right to file a grievance.

[3] In January 2011, after reviewing the parties' positions on the objection, I concluded that it would be appropriate to settle the issue of the objection before dealing with the grievance on the merits, if applicable. Thus, the evidence and arguments presented at the hearing focused solely on the employer's objection that Mr. Bigdeli-Azari was not an employee under the *Act*.

[4] To decide the employer's objection, I must review the following provisions of the *Act*:

. . .

206. *(1) The following definitions apply in this Part.*

"employee" has the meaning that would be assigned by the definition "employee" in subsection 2(1) if that definition were read without reference to paragraphs (e) *and* (i) *and without reference to the words "except in Part 2".*

. . .

2. *(1) The following definitions apply in this Act.*

. . .

> *"employee", except in Part 2, means a person employed in the public service, other than*
>
> . . .
>
> *(c) a person not ordinarily required to work more than one third of the normal period for persons doing similar work;*
>
> . . .
>
> *(f) a person employed on a casual basis;*
>
> *(g) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more. . . .*
>
> . . .

Summary of the evidence

[5] Mr. Bigdeli-Azari testified. The employer called Julie Gadoury as a witness. She is the chief of dietary services at Ste. Anne's Hospital. She headed the department in which Mr. Bigdeli-Azari worked. The parties introduced seven documents into evidence, including the job offer made to Mr. Bigdeli-Azari when he was hired and timesheets indicating the hours he worked between February 2010 and August 2010.

[6] Mr. Bigdeli-Azari was hired on February 2, 2010, as a general attendant in the Dietary Service Department of Ste. Anne's Hospital for a term ending September 30, 2010, with "on-call" status. The job offer contained the following statement:

> . . .
>
> [Translation]
>
> *Given that you will not normally be required to work more than one third the normal work hours, you are not covered by Canada's Public Service Employment Act. As a result, you cannot be considered an employee under that Act. You may not benefit from the rights and privileges stipulated in that Act and its Regulations. Consequently, you are not eligible to take part in internal processes.*
>
> . . .

[7] Ms. Gadoury testified that on-call employees were used to make up for increased labour demands. Those employees have to be available for a minimum of

40 to 45 hours per month. If the employer asks them to work the standby hours it offers, it expects them to be available. The employer offers work to on-call employees based on their availability and considering their seniority. In general, the employer tries to offer no more than 52.5 hours per month to on-call employees to ensure that they do not regularly work more than one third of full-time employees' hours. However, the employer sometimes exceeds that number of hours when last-minute replacements are required that were not planned far in advance.

[8] On-call employees inform the employer of their hours of availability at least one month in advance. The employer then prepares a work schedule for them and posts it on boards reserved for that purpose. Mr. Bigdeli-Azari testified that the schedule is posted well in advance. Given that it cannot be posted before on-call employees' availabilities are known, I take it that the schedule is posted three or four weeks in advance. In addition to the scheduled hours of work, the employer also asks on-call employees to voluntarily fill, at the last minute, unexpected absences by other employees. Mr. Bigdeli-Azari testified that he was often called to voluntarily fill in. He does not remember exactly how many times he filled in, but he admitted that it could have been two or three times per month.

[9] Mr. Bigdeli-Azari's timesheets show that he worked the following number of hours between February and August 2010:

February 2010	60.5 hours
March 2010	62.0 hours
April 2010	53.75 hours
May 2010	50.17 hours
June 2010	56.0 hours
July 2010	51.5 hours
August 2010	12.0 hours

[10] The employer terminated Mr. Bigdeli-Azari's employment on August 5, 2010, because it was not satisfied with his performance. The timesheets show that, mostly, Mr. Bigdeli-Azari worked daily calls of 4 or 6.5 hours.

Summary of the arguments

[11] The employer claimed that I was without jurisdiction to hear the grievance because Mr. Bigdeli-Azari was not an employee under the *Act* when he filed his

grievance. In fact, the job offer he signed is clear on that point. He was hired as an on-call employee and was not required to work more than one third of normal work hours. Definitely, some months he worked more than one third of the normal work hours. However, that did not change his job status, which was determined by his employment contract rather than by the number of hours he actually worked. In addition, he was never required to work more than one third of the hours expected from a full-time employee.

[12] The employer referred me to the following decisions: *Nemours v. Canada (Attorney General)*, 2010 FC 158; and *Canada (Attorney General) v. Public Service Alliance of Canada (Econosult)*, [1991] 1 S.C.R. 614.

[13] Mr. Bigdeli-Azari submitted that, in fact, he worked more than one third of the hours normally required of a full-time employee. He then became an employee within the meaning of the *Act*. His situation differed from that stipulated in the job offer, in which the employer indicated that he would not be required to work more than one third of normal work hours. In fact, Mr. Bigdeli-Azari worked more than one third of the normal work hours almost every month he worked for the employer.

[14] For Mr. Bigdeli-Azari, the facts of his grievance differ from those in *Nemours.* In that case, the employee did not work more than one third of the hours under her last employment contract.

Reasons

[15] The question before me is to determine whether Mr. Bigdeli-Azari was an employee within the meaning of the *Act* and, therefore, whether he had the right to file a grievance and refer it to adjudication. To answer that question, I have to interpret paragraph 2(1)(*c*) of the *Act*. Specifically, given the evidence, I must establish whether Mr. Bigdeli-Azari was ". . . ordinarily required to work more than one third of the normal period for persons doing similar work." If he was not normally required to work more than one third of the normal work hours, I have no jurisdiction to hear his grievance. If he was normally required to work more than one third of the normal work hours, I will conclude that I have jurisdiction to hear his grievance.

[16] The evidence shows that Mr. Bigdeli-Azari was hired to work less than one third of the normal work hours. Indeed, that was clearly indicated in the job offer he accepted, which serves as the employment contract.

[17] The evidence also shows that, on average, Mr. Bigdeli-Azari worked more than one third of the normal work hours. Considering that each year has 52.18 weeks (52 weeks + 1 day + ¼ day for leap years) and that a normal workweek is 37.5 hours, one third of the normal annual work hours is 652.25 hours, and one third of the monthly hours is 54.35 hours. For its part, the employer tries to limit the number of hours worked monthly by on-call employees to 52.5. One third of the weekly hours is 12.5 hours. Overall, the employer employed Mr. Bigdeli-Azari for 26 weeks and 2 days, and he worked 345.92 hours, for a weekly average of 13.1 hours. For his full 26 weeks of employment, his total number of hours exceeds it by 20 hours ((652.25÷2) - 345.92). Therefore, Mr. Bigdeli-Azari is correct that he worked more than one third of the normal work hours.

[18] To establish whether Mr. Bigdeli-Azari was an employee within the meaning of the *Act*, I am obliged to look beyond an analysis of his employment contract and to determine whether in fact he was normally required to work more than one third of the hours, particularly since the employment contract does not refer to the exclusion of rights and privileges under the *Act* but rather under the *Public Service Employment Act* (*PSEA*). On that point, in *Canada (Attorney General) v. Marinos,* [1998] F.C.J. No. 461 (T.D.) (QL), the Federal Court pointed out that the exclusion of legislative protections under the *PSEA* did not automatically mean the exclusion of the scope of protections under the *Act*.

[19] As I noted earlier, Mr. Bigdeli-Azari was correct in that he worked more than one third of the hours of a full-time employee, even if the average number of hours he worked weekly exceeded one third of the hours by only about one hour per week. However, Mr. Bigdeli-Azari failed to point out that he was not normally required or forced to work more than one third of the hours.

[20] It seems to me that, based on the facts before me, the number of hours that a person is “ordinarily required” to work is the number of hours planned on that person’s normal work schedule. Thus, a full-time general attendant is required to work 37.5 hours per week. If the evidence showed that Mr. Bigdeli-Azari was normally required to work more than one third of those hours, I would conclude that he was an

employee within the meaning of the *Act*, but that is not the case. Although the evidence does not allow me to determine exactly how many hours Mr. Bigdeli-Azari was required to work, it does allow me to conclude that it was less than one third of a full-time employee's work hours. The hours planned on Mr. Bigdeli-Azari's work schedule were established several weeks in advance. He was constrained to those hours; i.e., he had to work those hours. However, he was not required to work the hours offered to him as a last-minute replacement. He admitted that he accepted work as a last-minute replacement two or three times a month. Those replacements made his average work hours exceed one third of the normal hours; the regular work schedule that he was required to work did not.

[21] Given the preceding, I uphold the employer's objection to my jurisdiction to hear this grievance because Mr. Bigdeli-Azari was not an employee within the meaning of the *Act*.

[22] The employer referred me to *Nemours*. That decision's facts differ from this case because the employee in *Nemours* had a contract for less than one third of the time. In fact, she did not work more than one third of the time as an employee, unlike Mr. Bigdeli-Azari, who worked more than one third of the time even though he was not required to. The employer also referred me to *Econosult*. That decision involved union membership or certification for which the employee's status needed to be established. The context of this case is clearly different.

[23] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[24] I declare that I am without jurisdiction to hear this grievance.

[25] I order the file closed.

November 4, 2011.

PSLRB Translation

Renaud Paquet,
adjudicator